Supreme Court, U.S.
FILED

No. 93 1788 MAY - 3 1994

OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

HARRY E. BROWNLEE and ROY M. WADDELL,
Petitioners,

vs.

LEAR SIEGLER MANAGEMENT SERVICES CORP.,
a foreign corporation,
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

FREDERICK W. SOUTHERN, jr.
Attorney for Petitioners
700 North Walker
Oklahoma City, OK 73102
(405) 236-3701 (Fax: 239-6825)

May 3, 1994

88 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is an employer liable for the discriminatory acts of a foreign government where the employer delegates employment decisions to the foreign government and has actual knowledge of age discrimination by the foreign government?

2. When an employer has delegated employment decisions to a foreign government, does the foreign government become the agent of the employer under the Age Discrimination in Employment Act, and will the acts of the foreign government subject the employer to liability for discriminatory acts of the foreign government?

3. Where the United States Government has reserved the exclusive right to direct a contractor in the performance of a contract, may the contractor circumvent the contractual obligation so imposed by use of an individual employment contract?

4. May a party in a trial deposition introduce evidence through their own witness and later attempt to exclude the same evidence from trial through a Motion in Limine?

LIST OF PARTIES

The caption contains all of the parties to the proceedings before the United States Court of Appeals for the Tenth Circuit and the United States District Court for the Western District of Oklahoma.

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 2

Statutes and Constitutional Provisions 4

Statement of the Case 6

Reasons for Granting the Writ . . . 20

Conclusion 31

TABLE OF AUTHORITIES

EEOC v. Gaddis,
733 F.2d 1373
(10th Cir. 1984) 30

Flosers v. Crouch-Walker Corp.,
552 F.2d 1277, 1282 (7th Cir. 1977) . 30

Hunter v. Allis-Chalmers Corp.,
797 F.2d at 1422 28

Jeter v. Boswell, 554 F.Supp. 946, 952-53
(N.D.W.Va. 1982) 29

Kolb v. State of Ohio,
Dept. of Mental Ret. & Dev.,
721 F.Supp. 885 (N.D.Ohio 1989) . . . 29

Lucero v. Beth Israel Hospital
& Geriatric Center,
479 F.Supp. 452, 455
(D.Colo. 1979) 30

Miller v. Bank of America,
600 F.2d 211, 213 (9th Cir. 1979) . . 30

North v. Madison Area Ass'n,
844 F.2d 401, 407
(7th Cir. 1988) 28

Shager v. Upjohn Co.,
913 F.2d 398 (7th Cir. 1990) 28

Spirt v. Teachers Insurance and Annuity
Ass'n, 475 F.Supp. 1298, 1308 (S.D.N.Y.
1979), aff'd in relevant part,
691 F.2d 1054 (2d Cir. 1982) 29

York v. Tennessee Crushed Stone Ass'n,
684 F.2d 360, 362 (6th Cir. 1982) . . 29

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 3

28 U.S.C. §§ 1331, 1343(a)(4), 2201, and 2202 3

29 U.S.C. § 621 2

29 U.S.C. § 623 4

29 U.S.C. § 626(c) 3

Rule 4(a), F.R.A.P. 3

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

HARRY E. BROWNLEE and ROY M. WADDELL,
Petitioners,

vs.

LEAR SIEGLER MANAGEMENT SERVICES CORP.,
a foreign corporation,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Harry E. Brownlee and Roy M. Waddell respectfully pray that a Writ of Certiorari be issued to review the February 2, 1994, Order and Judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered on February 2, 1994, is reprinted as Appendix "A" hereto. This Order and Judgment is reported at 15 F.3d 976 (10th Cir. 1994).

The Judgment of the United States District Court for the Western District of Oklahoma entered on February 24, 1993, is reprinted as Appendix "C" hereto.

JURISDICTION

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit was entered on February 2, 1994. This Petition for Writ of Certiorari was filed within ninety (90) days of the Order and Judgment of the United States Court of Appeals for the Tenth Circuit pursuant to Rule 13.1 of the Rules of the Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

The original action filed in the United States District Court for the Western District of Oklahoma was for discrimination in employment in wilful violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq., breach of written contract of employment, and for declaratory and injunctive relief, all for which Petitioners timely demanded a jury trial. Jurisdiction of the District Court

was based on 28 U.S.C. §§ 1331, 1343(a)(4), 2201, and 2202, and 29 U.S.C. § 626(c). The Judgment of the United States District Court for the Western District of Oklahoma entered on February 24, 1993, was a final order appealable of right pursuant to 28 U.S.C. §1291. The initial appeal was perfected in accordance with Rule 4(a), F.R.A.P.

STATUTES AND CONSTITUTIONAL PROVISIONS

The following provisions of federal statutes are involved in the questions presented by this Petition for Writ of Certiorari.

29 U.S.C. § 623. Prohibition of age discrimination.

> (a) Employer practices. It shall be unlawful for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

29 U.S.C. § 630. Definitions. For the purposes of this act --

> (b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such person, and (2) a State or political subdivision of a

State and any agency or instrumentality of a State or political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

STATEMENT OF THE CASE

The Petitioners are Harry E. Brownlee and Roy M. Waddell, male citizens of the United States and residents of the State of Virginia (Brownlee) and the State of Arizona (Waddell). Brownlee's date of birth is 1/8/38. Waddell's date of birth is 2/12/34.

This is a civil action for damages brought by the Petitioners, Harry E. Brownlee and Roy M. Waddell, male citizens and residents of the United States, against the Respondent, Lear Siegler Management Services Corp., a Delaware Corporation, for discrimination in employment in wilful violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq., breach of written contract of employment, and for declaratory and injunctive relief.

Petitioners were interviewed by agents of LSI in Oklahoma City, Oklahoma,

and signed their employment contracts.

On 1/11/90 Brownlee entered into a written standardized contract of employment with LSI to perform services for LSI under the Contract in Saudi Arabia for the RSAF. Brownlee was employed by LSI from 2/16/90 until his termination from employment effective 8/15/90.

On 2/20/90 Waddell entered into a written standardized contract of employment with LSI to perform services for LSI under the Contract in Saudi Arabia for the RSAF. Waddell was employed by LSI from 3/23/90 until his termination from employment effective 8/15/90.

Brownlee and Waddell were fully qualified for their positions, would have been performing the duties of their positions but for the improper acts of the RSAF, were terminated from their positions, and were replaced by younger persons.

Both Brownlee and Waddell relied on the statements and representations of LSI's agent when presented the written contract for signature, including:

a. The contract was written in both English and in Arabic, allegedly in parallel paragraphs;

b. The contract was adhesive and not subject to negotiation or modification in its terms or conditions;

c. The contract was presented on a "take it or leave it" basis;

d. The contract provided for a thirty-six (36) month contract term, raises, bonuses, benefits, options and special provisions for housing, transportation, medical examinations, probationary period, specific contract termination conditions, and forum selection, jurisdiction, venue, and applicable law provisions;

e. The Arabic presentation was an accurate translation of the English contract.

Petitioners were not experienced in contract negotiation or modification. Petitioners relied heavily on LSI's

agent's statements and representations that the contract was not subject to modification and, that as a condition of employment, they were required to sign and accept the contract, both the English and Arabic portions, as written.

Petitioners were assigned to work with and under RSAF management. Upon being introduced to the RSAF management, Petitioners were confronted with the claim of the RSAF management that they were "too old" and were refused the opportunity to enter the work station and refused the opportunity to perform any of the job duties.

This claim of the RSAF management that Petitioners were "too old" was repeated to other persons, including both U.S. Government representatives and other LSI employees. The RSAF management then attempted to have the Petitioners removed.

The responsible U.S. Government

representative denied the request of the RSAF management informing the RSAF management that they had to have a reason recognized under the individual employment contracts.

The RSAF management then claimed that the Petitioners were not qualified for their positions and again attempted to have the Petitioners removed.

The responsible U.S. Government representative investigated the "not qualified" claims of the RSAF management and denied the claim finding that the Petitioners were fully qualified for their positions.

The RSAF management then claimed that the Petitioners were not performing their assigned duties.

The responsible U.S. Government representative investigated the new claim of the RSAF management and found that the Petitioners were not performing their

assigned duties because the RSAF management would not permit the Petitioners into the assigned work station and would not permit the Petitioners to perform any duties at all. The responsible U.S. Government representative denied the claim informing the RSAF management that they had to permit the Petitioners access to the work station and permit the Petitioners an opportunity to perform their assigned duties.

The RSAF management persisted in their refusal to permit the Petitioners to enter the work station and refusal to permit the Petitioners to perform any duties, all in violation of the applicable contracts and agreements between Saudi Arabia, the U.S. Government, LSI, and the individual employment contracts.

Petitioners wrote a letter to LSI management on 5/22/90 requesting that LSI intervene in the matter and seek a just

resolution.

Robert Winklepleck ("Winklepleck") was employed as the Respondent's site manager at Dhahran. The Director of Depot Supply in 1990 (Saudi Royal Air Force) was Lieutenant Colonel Misfer Al Ghamdi. The Peace Hawk project officer in 1990 was Lieutenant Colonel Abdullah A. Rajeh.

The first time Winklepleck was aware of a problem for Petitioners was when he was given a "back-door copy" of a letter from Colonel Misfer to the Peace Hawk project officer stating that Colonel Misfer wanted Petitioners terminated because the Petitioners were "very poor in their performance because of old age". Winklepleck took a copy of the letter and confronted Colonel Rajeh and asked him what the letter was about. Colonel Rajeh had his clerk retrieve a copy of the same letter from his files and gave Winklepleck a copy of his transmittal letter he had

written to the Chief Peace Hawk Officer in Riyadh (Colonel Rajeh's supervisor) requesting Petitioners be terminated which incorporated the letter from Colonel Al Ghamdi to Colonel Rajeh by both reference and by attachment (a copy of Colonel Al Ghamdi's letter was attached to Colonel Misfer's letter to the Chief Peace Hawk). When Winklepleck questioned Colonel Rajeh as to what this was all about, Colonel Rajeh told Winklepleck that "they weren't qualified, Colonel Misfer said so, and that was it." Winklepleck then faxed copies of the two letters to the Respondent's head office in Riyadh. Winklepleck attempted to talk with Colonel Misfer Al Ghamdi about the situation and was told "I'll talk to you about anything except them. It's a closed issue. They're gone."

According to Winklepleck, the real reason for Petitioners' termination was

not because they were not qualified "because everybody knew they were qualified."

LSI, with knowledge of the facts and circumstances and statements of RSAF management that the Petitioners were "too old", wholly failed, refused, or neglected to intervene or assist the Petitioners in violation of the applicable contracts and agreements between Saudi Arabia, the U.S. Government, LSI, the individual employment contracts, and in wilful violation of the ADEA.

LSI, rather than take appropriate action in the Petitioners behalf, ordered the Petitioners to leave Saudi Arabia on very short notice and took action to have their visas and work permits immediately canceled.

As a result, Petitioners were forced to leave Saudi Arabia quickly and their individual employment contracts were

improperly terminated. No valid reason for contract termination (as stated in the written standardized employment contract) was ever given to justify termination of the Petitioners' employment contracts.

In drafting the exculpatory employment contracts, LSI knew or should have known that the Petitioners would be unable to enforce any rights as required by Articles VII and VIII and would be forced to leave Saudi Arabia on very short notice, their visas and work permits canceled, yet insisted on their inclusion and applicability thus incorporating unconscionable provisions in the contracts.

Petitioners' visas and work permits were canceled and Petitioners were compelled to leave Saudi Arabia on very short notice with no right to remain even if Petitioners wished to attempt to litigate any matters in the courts of

Saudi Arabia.

Petitioners timely filed a Charge of Discrimination with the Equal Employment Opportunity Commission.

On 2/20/92 Petitioners timely filed a lawsuit in the United States District Court for the Western District of Oklahoma and demanded a jury trial.

On 4/1/92, Respondent filed an Answer to Petitioners' Complaint.

On 10/7/92 the Respondent took the trial deposition of their site manager from Dhahran, Saudi Arabia, who would not be present for the trial of this action, in Tampa, Florida, pursuant to Notice from the Respondent's counsel. During this deposition, Respondent's introduced the letter (Defendant's Exhibit 3) from Colonel Misfer to the Peace Hawk project officer stating that Colonel Misfer wanted the Petitioners terminated because the Petitioners were "very poor in their

performance because of old age", which constituted direct evidence of age discrimination.

On 11/23/92 both Petitioners' and Respondent's moved for partial summary judgment and on 12/9/92 Petitioners and Respondent responded to the respective motions. Reply briefs were also filed by both Petitioners and Respondent.

On 12/4/92 Respondent's filed a Motion In Limine and Brief In Support to exclude, among other things, the letter which was Defendant's Exhibit 3 to the Winklepleck deposition and on 12/21/92 Petitioners filed their Answer Brief To Respondent's Motion In Limine.

On 2/8/93 Petitioners filed an Application To Take Telephonic Trial Deposition of Alfred Leland Justice, the Administrative Contracting Officer responsible for administration and enforcement of the LSI/USAF contract for

the United States Air Force in Saudi Arabia. On 2/18/93 the Respondent's counsel withdrew his objection to the taking of this deposition and the Court was notified that the deposition would be taken by agreement and furnished to the Court. On 2/24/93, while counsel and a court reporter were waiting for the deponent to return a telephone call for his telephonic deposition, counsel were notified by the Court that the Court had sustained the Respondent's Motion in Limine and had granted the Respondent's Motion for Summary Judgment.

On 2/24/93 the Court entered an Order granting Respondent's Motion For Summary Judgment and denying Petitioners' Motion For Partial Summary Judgment, and entered Judgment in this action.

Petitioners appealed the Judgment entered by the District Court.

The Court of Appeals for the Tenth

Circuit affirmed the decision of the Trial Court on Respondent's Motion In Limine and the Trial Court's entry of Summary Judgment for the Respondent.

It is from this latter holding that Petitioners seek review via a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The reasons for granting review of the District Court and Court of Appeals for the Tenth Circuit are as follows:

The Court of Appeals for the Tenth Circuit has incorrectly decided issues of agency and federal law involving the discriminatory actions of a foreign government in the execution of a contract between the United States Government and a United States corporation not previously addressed to the Supreme Court which should be decided by this Court and incorrectly interpreted and failed to apply the provisions a contract between the United States Air Force and the Respondent, Lear Siegler.

The reasons for granting review of the District Court and Court of Appeals for the Tenth Circuit are as follows.

In January, 1990, the Respondent entered into a written contract with the

United States Air Force to provide Contractor "mission support and training for the Royal Saudi Air Force (RSAF)" in Saudi Arabia. The objective of the contract was to provide "Contractor manpower to augment the RSAF in accomplishment of the Royal Saudi Air Force mission. To accomplish this, the [contractor] is to provide technically qualified Contractor manning to augment, assist, train and advise RSAF personnel."

The contract further provided that:

> The contract, as an instrument of the U.S. Government, will be administered in accordance with established US/DOD procurement policies and procedures and U.S. Laws. SOW ¶ 1.3.2(a).
>
> The ACO [USAF administrative contracting officer] is the only person in-Kingdom who can officially enforce the terms and conditions of the contract and provide direction to the Contractor. SOW ¶ 1.3.2(d).
>
> The contractor shall be responsible for selecting personnel who are qualified to perform the required services. ... The contractor shall make

every effort to sign incumbent employees to two or three year employment agreements. ¶H-921.

The ACO may direct the Contractor in writing to remove, and the Contractor shall remove, any employee from an assignment to perform services under this contract. ¶H-918.

The Contractor and Contractor personnel shall respect the laws, customs and regulations of Saudi Arabia, including the laws prohibiting access to certain areas of the country to non-Muslims or non-Saudis; provided that this obligation to respect or comply with (i) laws, customs or regulations of Saudi Arabia, or (ii) any other requirements imposed by Saudi Arabia pursuant to this contract, are subject to, without limitation of, and effective only to the extent not inconsistent with or penalized by applicable U.S. laws and regulations, including those relating to foreign boycotts, those prohibiting discrimination in employing or assigning personnel (FAR 52-225-7019) and those requiring notification of any visa denial believed to be attributable to race, religion, sex or national origin (FAR 52-222-29). ¶H-900.

In an attempt to circumvent the above stated requirements, the Respondent incorporated the following provisions into the employment agreements with their employees or "contractor personnel" (¶H-921):

> Article VI
> Termination
>
> A. EMPLOYER shall have the right to terminate this Agreement and, therefore, the employment of EMPLOYEE hereunder, provided that thirty (30) days notice is given when:
>
> 5) The EMPLOYER is directed by the United States Air Force/LSG, Saudi Arabian Government (SAG) or any other U.S. Government representative to terminate the employment of the EMPLOYEE, or
>
> Article VII
> Applicable Law &
> Sole Jurisdiction
>
> This Agreement shall be governed by the laws of the Kingdom of Saudi Arabia. The courts of Saudi Arabia shall have sole jurisdiction over any disputes arising out of this Agreement.

Article VIII
General

> Other employment matters which relate to this Agreement, and not specifically provided for herein, shall be in accordance with attached Exhibit A, Company policy, or the laws of the Kingdom of Saudi Arabia.

After reviewing the contract between Lear and the United States Air Force, the Tenth Circuit concluded that the United States Air Force - Lear contract contemplated that Lear employees may be "terminated from employment under the program because the [United States authorities] and/or the Royal Saudi Air Force/Saudi Arabian Government determines such employee[s] may not remain in the program."

The Tenth Circuit failed to recognize that the United States Air Force also foresaw possible violations of United States laws and provided protection for United States employees. The entire paragraph of the contract states:

> An employee of the Contractor/Subcontractor terminated from employment under the program because the PCO/ACO and/or the Royal Saudi Air Force/Saudi Arabian Government determines such employee may not remain in the program shall be replaced in accordance with the requirements herein. However, any claim brought against the Contractor/Subcontractor under labor laws of the United States (US) and adjudged to be valid by US Courts, agencies or officials having jurisdiction shall be reimbursed to the Contractor at cost including allocable G & A, excluding profit. Such reimbursement shall be made after the Contractor has submitted prime facia evidence to the PCO establishing that, as regards the subject of the claim, the practices of the Contractor or Subcontractor, with respect to the individual employee, were consistent with its standard policy with respect to the employee. The contractor will submit invoices to the PCO of decisions and settlements awarded against the Contractor by US competent authority. ¶ H-918. [Emphasis added]

This contract provision acknowledges that the contractor (Lear) could be held liable in United States Courts for

terminating employees for unlawful reasons in the United States, even if directed to do so by the RSAF. The United States Air Force had the foresight to protect a contractor from bearing the financial burden of a judgment against them in the United States Courts for a wrong the contractor committed at the direction of the RSAF.

The contract between the United States Air Force - Lear, also provides that:

> The Contractor (LSI) and Contractor personnel (Petitioners) shall respect the laws, customs and regulations of Saudi Arabia, including the laws prohibit access to certain areas of the country to non-Muslims or non-Saudis: provided that this obligation and any other provision of this contract requiring the Contractor or its personnel to respect or comply with (i) laws, customs or regulations of Saudi Arabia, or (ii) any other requirements imposed by Saudi Arabia pursuant to this contract, are subject to, without limitation of, and effective only to the extent

> not inconsistent with or penalized by applicable U.S. laws and regulations, including those relating to foreign boycotts, those prohibiting discrimination in employing or assigning personnel (FAR 52-225-7019) and those requiring notification of any visa denial believed to be attributable to race, religion, sex or national origin (FAR 52-222-29). ¶H-900. [Emphasis added]

This contract provision clearly provides that actions should not be taken by the Contractor regardless of Saudi Arabia laws, customs and regulations, if they are inconsistent with applicable United States laws. Clearly, terminating Petitioners because of their age is inconsistent with United States laws, regardless if the Saudi's thought the Petitioners were "too old".

The Respondent, acting without the required authority from the USAF, have acquiesced and ratified the discriminatory acts of the RSAF. Either the Respondent has delegated employment-making decisions

to the RSAF or has made the RSAF the agent of the Respondent to make employment decisions.

In regards to the establishment of an agency relationship, the ADEA includes in the definition of "employer" an agent of an employer. 29 U.S.C. § 630(b).

> The Age Discrimination in Employment Act is not completely silent on the issue of agency. The Act imposes liability only on employers, but defines "employer" to include "agent," 29 U.S.C. § 630(b), a term that embraces but is more encompassing than "employee"; all employees are agents, but not all agents are employees. Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990).
>
> The deliberate act of an employee acting within the scope of his authority is the act of the employer, for an employer, at least where it is a corporation, acts only through agents. Hunter v. Allis-Chalmers Corp., supra, 797 F.2d at 1422; North v. Madison Area Ass'n, 844 F.2d 401, 407 (7th Cir. 1988). Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990).
>
> The Sixth Circuit has construed

> the term "agent" to denote "a supervisory or managerial employee to whom employment decisions have been delegated by the employer." York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360, 362 (6th Cir. 1982). Thus, supervisory employees who had responsibility for making personnel decisions for a defendant company were considered its agents. Jeter v. Boswell, 554 F.Supp. 946, 952-53 (N.D.W.Va. 1982). Kolb v. State of Ohio, Dept. of Mental Ret. & Dev., 721 F.Supp. 885 (N.D.Ohio 1989).

Similarly, under Title VII, Courts have held employers liable for the acts of their agents. In Kolb v. State of Ohio, Dept. of Mental Ret. & Dev., 721 F.Supp. 885 (N.D.Ohio 1989), the Court stated:

> Holding responsible those who control the aspects of employment accorded protection under Title VII is consistent with the congressional intent both that the Act's effectiveness not be frustrated by an employer's delegating authority ... Spirt v. Teachers Insurance and Annuity Ass'n, 475 F.Supp. 1298, 1308 (S.D.N.Y. 1979), aff'd in relevant part, 691 F.2d 1054 (2d Cir. 1982). Accordingly, those individuals who are

> charged with the responsibility of making and/or contributing to employment decisions for the defendant employer may be liable as its agents under Title VII.

Where the act is that of a supervisor (agent), the employer will also be liable. In EEOC v. Gaddis, 733 F.2d 1373 (10th Cir. 1984), the Court stated:

> An employer is liable under both Title VII and section 1981 "where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, even though what the supervisor is said to have done violates company policy." Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979); see also Flosers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977); Lucero v. Beth Israel Hospital & Geriatric Center, 479 F.Supp. 452, 455 (D.Colo. 1979).

It is clear that the Respondent claims that it received direction from the RSAF to terminate the Petitioners' employments. Since this "direction" was not permitted by the USAF-Lear contract,

and was in direct contravention of an express contract provision (SOW ¶ 1.3.2(d)), either the Respondent had delegated employment-making decisions to the RSAF or the RSAF was acting as the agent of the Respondent in making or recommending employment decisions. In either case, the Respondent employer is liable for the acts of the RSAF to which it acquiesced or ratified.

Both the Trial Court and the Tenth Circuit erred in holding that the letter introduced during the Winklepleck deposition as Defendant's Exhibit 3 from Colonel Misfer to the Peace Hawk project officer stating that Colonel Misfer wanted the Plaintiffs terminated because the Plaintiffs were "very poor in their performance because of old age", (direct evidence of age discrimination), did not fall within the business record exception to the hearsay rule. While Winklepleck's

first acquisition of Defendant's Exhibit 3 was a "back door copy", he took this letter and "confronted" Colonel Rajeh with it, questioned him about it, and received a copy of both letters from Colonel Rajeh which were maintained in Colonel Rajeh's files. Winklepleck obtained and verified both letters within the scope of his employment as the Defendant's site manager. Colonel Rajeh was the recipient of Exhibit 3 (from his subordinate, Colonel Misfer Al Ghamdi) and the author of the transmittal letter that had Defendant's Exhibit 3 attached. As such, he qualifies as the custodian of both documents. These documents were maintained in the official files of the RSAF in their normal course of business. Both documents have been identified by Winklepleck as being documents of the RSAF obtained from and verified by the custodian of these documents, Colonel

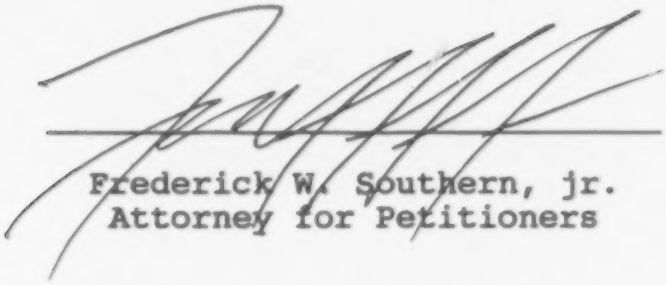
Rajeh. Both documents were placed in the Plaintiffs' site personnel files of which Winklepleck was the custodian of, maintained in the Plaintiffs' personnel files by Lear, and were produced to Plaintiffs by Lear in response to Plaintiffs' discovery request asking for Plaintiffs' complete personnel files.

This makes the letters admissible business records of both the RSAF and of the Respondent. The introduction of this letter by the Respondent in their direct examination of their own witness should also permit this letter to be considered as an admission by a party-deponent (Rule 801(d)(2)(c and d)) or a declaration against interest (Rule 804(b)(3)).

CONCLUSION

For the foregoing reasons, Petitioners ask this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted this 3rd day of May, 1994.

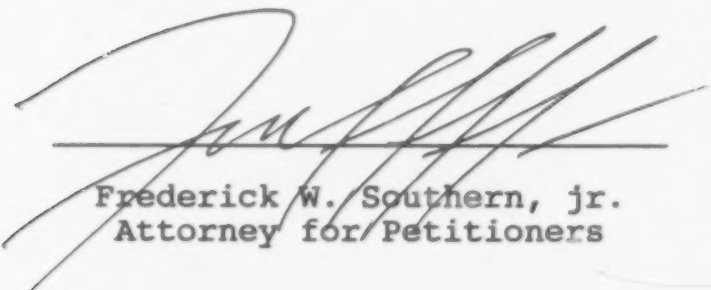


Frederick W. Southern, jr.
Attorney for Petitioners

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument was mailed, postage prepaid, this 3rd day of May, 1994, to:

George W. Dahnke, OBA # 2131
Hastie and Kirschner
3000 First Oklahoma Tower
210 West Park Avenue
Oklahoma City, Oklahoma 73102
(405) 239-6404 (Fax 239-6403)



Frederick W. Southern, jr.
Attorney for Petitioners

APPENDIX

A. Order and Judgment of the United States Court of Appeals for the Tenth Circuit A-1

B. Notice of Appeal B-1

C. Judgment of the United States District Court For the Western District C-1

D. Memorandum Opinion of the United States District Court for the Western District of Oklahoma D-1

E. Order on Defendant's Motion In Limine E-1

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HARRY E. BROWNLEE and ROY M. WADDELL,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 93-6121
LEAR SIEGLER MANAGEMENT SERVICES CORP., a foreign corporation,	)	
Defendant-Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-92-318-AR)

Submitted on the briefs:

Frederick W. Southern, Jr., Oklahoma City, Oklahoma, for Plaintiffs-Appellants.

George W. Dahnke of Hastie and Kirschner, Oklahoma City, Oklahoma, for Defendant-Appellee.

Before TACHA and BRORBY, Circuit Judges, and BROWN, * Senior District Judge.

---

*Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

TACHA, Circuit Judge.

Plaintiffs Harry E. Brownlee and Roy M. Waddell appeal from a summary judgment entered by the magistrate judge[1] in favor of their employer, defendant Lear Siegler Management Services Corp. (Lear), in this employment discrimination/breach of contract action. In early 1990, plaintiffs signed three-year employment contracts with Lear to work in Saudi Arabia under the direction of the Royal Saudi Air Force (RSAF), in connection with Lear's contractual commitment with the United States Air Force to provide technical assistance and support to the RSAF. Sometime after plaintiffs' arrival in-country, RSAF personnel insisted plaintiffs were unsuitable for their assigned duties--allegedly based on impermissible age considerations--and

---

[1] The parties consented to disposition of the case by the magistrate judge pursuant to 28 U.S.C. §636 (c) (1). Our jurisdiction therefore arises under § 636 (c) (3).

barred plaintiffs from their work stations. When efforts to dissuade the RSAF proved fruitless, Lear capitulated and terminated plaintiffs. The magistrate judge rejected plaintiffs' resulting claims of age discrimination and breach of contract, and this appeal followed.[2] On de novo review, see Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990), we affirm.

Based on uncontroverted evidence, the magistrate judge held that Lear "only terminated the Plaintiffs because of directions by the RSAF and not because of their age." App. Vol. I at 122. The judge further noted that "Plaintiffs were

---

[2] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34 (a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

hired specifically to perform work under the contract in Saudi Arabia, and if they could no longer perform that contract, there has been no requirement shown that [Lear] must find other work for them in the United States." Id. Finally, the judge concluded that "Plaintiffs have failed to prove any legal obligation of the Defendant Lear Siegler for the actions, deeds or thoughts of the RSAF or the [Saudi Arabian government]," id. at 123, and granted summary judgement for Lear accordingly.

To give rise to an employment discrimination claim for disparate treatment, the employer must act out of an improper discriminatory motivation. See EEOC v. Flasher Co., 986 F.2d 1312, 1319 (10th Cir. 1992); Drake v. City of Fort Collins, 927 F.2d 1156, 1160-61 (10th Cir. 1991). As the magistrate judge noted, however, plaintiffs do not rely on any

evidence indicating Lear ever intended to discriminate on the basis of age. Consequently, plaintiffs' case turns on whether the RSAF's alleged discriminatory intent may somehow be imputed to Lear.

Despite the crucial nature of the issue, plaintiffs do not cite a single authority or even present a developed argument for ascribing the requisite discriminatory animus to Lear in this unusual setting. Rather, we are provided only the unsupported, conclusory assertion that "[h]aving knowledge that your boss wants to discriminate and acquiescing in his discrimination (or failing to take available remedial action) makes the subordinate equally liable for the discrimination." Opening Brief of Appellants at 22. This is not adequate appellate argument. See Phillips v. Calhoun, 956 F.2d 949, 953-54 (10th Cir. 1992) (quoting Pelfresne v. Village of

Williams Bay, 917 F.2d 1017, 1023 (7th Cir. 1990), for litigant's responsibility "to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority or in the face of contrary authority").

If plaintiffs mean to suggest that agency principles allow them to impute the RSAF's alleged discriminatory intent to Lear because Lear acted at the direction or compulsion of the RSAF, the law does not support their position. While a principal's status as an employer can be attributed to its agent to make the agent statutorily liable for his own age-discriminatory conduct, see 29 U.S.C. § 630(b); see, e.g., House v. Cannon Mills Co., 713 F. Supp. 159, 161-62 (M.D.N.C. 1988); cf. Owens v. Rush, 636 F.2d 283, 286-87 (10th Cir. 1980), we know of no authority for imputing a principal's

discriminatory intent to an agent to make the agent liable for his otherwise neutral business decision. Similarly, while discriminatory practices of an agent may be imputed back to a principal to render the principal liable for its agent's statutory violations, see, e.g., Shager v. Upjohn Co., 913 F.2d 398, 404-05 (7th Cir. 1990); cf. EEOC v. Gaddis, 733 F.2d 1373, 1380 (10th Cir. 1984), we have found no authority for imputing statutory liability in the opposite direction, from a culpable principal to an innocent agent.[3]

---

[3] We note that the possibility of characterizing Lear as an "employment agency," i.e., an entity "regularly undertaking to procure employees for an employer," 29 U.S.C. § 630(c), which then could be held liable for neutrally executing the discriminatory directions of its client, see authorities discussed in Barbara L. Schlei & Paul Grossman, Employment Discrimination Law at 656-67 (2d ed. 1983), and Five-Year Cumulative Supp. at 276-77 (1989), is precluded by the fact that the RSAF is not a covered "employer," as defined in § 630(b) and

(continued...)

We therefore affirm the magistrate judge's decision to grant summary judgment for Lear on plaintiffs' age discrimination claim. Because our disposition is analytically independent of the motivations underlying the conduct of RSAF personnel in the matter, we need not address the admissibility of certain RSAF documents reflecting a negative view of plaintiffs' ages.

The magistrate judge further held that plaintiffs' breach of contract claim also must fail as a matter of law because "[Lear], pursuant to the unambiguous language of the contract, was entitled to terminate the Plaintiffs if directed to do so by the [Saudi Arabian government], through its agent the RSAF." App. Vol. I at 124. We agree.

---

[3](...continued)
required by § 630(c), see, e.g., Shrock v. Altru Nurses Registry, 810 F.2d 658, 660-61 (7th Cir. 1987); Lavrov v. NCR Corp., 600 F. Supp. 923, 929 (S.D. Ohio 1984).

As the magistrate judge indicated, the parties' respective contracts of employment specifically provided that Lear had the right to terminate when "directed by the United States Air Force/LSG, Saudi Arabian Government (SAG) or any other U.S. Government representative to terminate the employment of the EMPLOYEE." App. Vol. III at 486-87, 501-022 (emphasis added). Plaintiffs insist Lear "can produce no authorized document addressed to [Lear] that 'demands' or 'directs' [Lear] to terminate either Plaintiff's employment," Opening Brief of Appellants at 19, and argue that, therefore, the quoted contract provision does not apply. That provision, however, does not require an "authorized document," and the undisputed evidence regarding the circumstances surrounding plaintiffs' brief employment in-country clearly establishes the RSAF's operative role in their termination. See App. Vol.

I at 116-17, 121-22.

Plaintiffs argue that the contract between Lear and the United States (Lear-U.S. contract) does not grant the RSAF the same authority to direct termination of personnel that is reflected in the quoted provision from plaintiffs' individual contracts with Lear. While it is not at all clear that such a divergence between these related but distinct contracts would undermine the provision relied on by Lear, we need not reach the question because the alleged conflict is illusory. In fact, the Lear-U.S. contract plainly contemplates that Lear employees may be "terminated from employment under the program because the [United States authorities] and/or the Royal Saudi Air Force/Saudi Arabian Government determines such employee[s] may not remain in the program." App. Vol. III at 595 (emphasis added). Other cited provisions

identifying the United States personnel responsible for execution or enforcement of the Lear-U.S. contract do not undermine or preclude the authority accorded the RSAF to direct termination under the terms of plaintiffs' contracts with Lear.

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF OKLAHOMA

HARRY E. BROWNLEE and ROY M. WADDELL,	)	
Plaintiffs,	)	
v.	)	CIV-92-318-AR
LEAR SIEGLER MANAGEMENT SERVICES CORP., a foreign corporation,	)	
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Harry E. Brownlee and Roy M. Waddell, Plaintiffs in the above entitled and numbered action, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Judgment entered on February 24, 1993.

Respectfully submitted,

/s/ Frederick W. Southern, jr.

Frederick W. Southern, jr.,
OBA # 10134
Attorney for the Plaintiff
1200 North Walker, Suite 500
Oklahoma City, Oklahoma 73103
(405) 236-3701 (Fax 239-6825)

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument was mailed, postage prepaid, this 25th day of March, 1993, to:

George W. Dahnke, OBA # 2131
Hastie and Kirschner
3000 First Oklahoma Tower
210 West Park Avenue
Oklahoma City, Oklahoma 73102
(405) 239-6404 (Fax 239-6403)

/s/ Frederick W. Southern, jr.

Frederick W. Southern, jr.
Attorney for the Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

HARRY E. BROWNLEE and ROY M. WADDELL,	)	
Plaintiffs	)	
v.	)	CIV-92-318-AR
LEAR SIEGLER MANAGEMENT SERVICES CORP., a foreign corporation,	)	
Defendant	)	

J U D G M E N T

Upon consideration of the parties' motions for summary judgment and the Court's Memorandum Opinion,

IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiffs' motion for summary judgment is DENIED and the Defendant's motion for summary judgment is GRANTED, and judgment is hereby entered in favor of the Defendant and against the Plaintiffs.

Dated this 24th day of February 1993.

/s/ DOYLE W. ARGO
UNITED STATES MAGISTRATE JUDGE

ENTERED IN JUDGMENT DOCKET ON
2-24-93

IN THE UNITED STATES DISTRICT COUNT

FOR THE WESTERN DISTRICT OF OKLAHOMA

HARRY E. BROWNLEE and ROY M. WADDELL,	)	
Plaintiffs	)	
v.	)	CIV-92-318-AR
LEAR SIEGLER MANAGEMENT SERVICES CORP., a foreign corporation,	)	
Defendant	)	

MEMORANDUM OPINION

On November 23, 1992, both the Plaintiffs and the Defendant filed separate motions requesting summary judgment with the Plaintiffs asking for partial summary judgment. Response briefs have been filed by both sides, and thus the motions are at issue and before the Court for resolution.

The Plaintiffs (Brownlee and Waddell) allege that they were both terminated from their employment by the Defendant based on their age in willful violation of the Age Discrimination in Employment Act of 1967

(ADEA), 29 U.S.C. §621 et seq. Plaintiffs further contend that their termination was in breach of their written employment contracts with the Defendant. The Plaintiffs ask for partial summary judgment on the issue of age discrimination arguing that they have established by the undisputed facts and as a matter of law that the Defendant discriminated against each Plaintiff based on age.

Defendant asserts that it was bound by but not responsible for the decision of the Royal Saudi Air Force (RSAF), under whose direction the Plaintiffs worked. The Defendant maintains that the Plaintiffs, based on the undisputed facts, cannot, as a matter of law, prove that the Defendant discriminated against them based on age. The Defendant also argues that it is entitled to summary judgment on the contract claim relying on the clause in

both Plaintiffs' employment contracts which allows the Defendant to terminate Plaintiffs if directed to do so by the RSAF or more specifically by the Saudi Arabian Government (SAG).

STATEMENT OF FACTS

The undisputed facts relevant to a determination of the summary judgment motions are as follows. The Defendant Lear Siegler Management Services Corp. (Lear Siegler) entered into a written contract with the United States Air Force (USAF) to provide logistics support to the RSAF in the Kingdom of Saudi Arabia. Pursuant to the contract, the Defendant Lear Siegler was required to provide the RSAF with certain personnel who were to work under the functional and supervisory control of the RSAF, but who were to remain under the administrative control of the Defendant Lear Siegler. On January 11, 1990, the Plaintiff Brownlee entered

into a written contract of employment with the Defendant Lear Siegler to perform services in Saudi Arabia for a period of three years. The Plaintiff Waddell entered into the same type of written agreement with the Defendant Lear Siegler on February 20, 1990.

Thereafter, both of the Plaintiffs went to Saudi Arabia where they performed work pursuant to their contracts of employment. It is undisputed that certain members of the RSAF under whose guidance and supervision the Plaintiffs were working, were highly inquisitive about personal matters of Lear Siegler employees, such as how old they were and whether they were married. It is further undisputed that the Plaintiff Brownlee, at least for a short period of time, had a personality conflict with certain of these RSAF members, precipitated by some of the personal questions and the conclusions

drawn by the RSAF members from Plaintiff Brownlee's responses.

It is further undisputed that the RSAF officers for whom the Plaintiffs worked later requested that the Plaintiffs be terminated although the parties dispute the reasons why their termination was requested. Plaintiffs contend that the RSAF officers demanded that the Plaintiffs be terminated because they were considered to old for their positions, while the Defendant claims that the reasons for the RSAF decision are not clear. As will be discussed more fully herein, this fact is not material to a resolution of the motions for summary judgment.

The parties to this lawsuit agree that both Plaintiffs were fully qualified for the positions and they believe that the Plaintiffs were performing the jobs in a satisfactory manner. The undisputed facts further show that the Defendant Lear

Siegler made some efforts to intervene on Plaintiffs' behalf, both directly with the RSAF officers and through the USAF. Despite the Defendant Lear Siegler's intervention, the RSAF demanded that the Plaintiffs be terminated, even going so far as to lock the Plaintiffs out of the work place. Finally, the RSAF officers absolutely refused to discuss the Plaintiffs or their situation with Lear Siegler.

Article VI of the Plaintiffs' written contracts of employment with the Defendant Lear Siegler addresses Lear Siegler's rights to terminate the contracts. This Article provides in relevant part that Lear Siegler had the right to terminate the contract when:

> A.
>
> 5) The EMPLOYER is directed by the United States Air Force/LSG, Saudian Arabian Government (SAG) or any other U.S. Government representative to terminate the employment of the EMPLOYEE, or...

After its efforts failed to convince the RSAF that the Plaintiffs were qualified for their positions, the Defendant Lear Siegler by letters dated July 17, 1990 terminated the employment of both Plaintiffs effective August 15, 1990. The reason given by the Defendant Lear Siegler to the Plaintiffs for their termination was due to directions received from the RSAF. Following the Plaintiffs termination, they were replaced by persons over the age of 40, with the Plaintiff Brownlee, who was 52 years old at the time, replaced by a person 41 years of age, and the Plaintiff Waddell, who was 56 years old at the time, replaced by a person who was either 51 or 61 years old.[1]

---

[1] The parties dispute whether Mr. Waddell's replacement was 51 or 61 years of age. A letter from Lear Siegler to the EEOC indicates that the replacement was 51 whereas Lear Siegler's personnel records clearly indicate that he was 61. Although again, this fact will not be material in the ultimate disposition of this matter.

The undisputed evidence also shows that the majority of the individuals employed by the Defendant to work in Saudi Arabia on this project are retired military, with the average age being somewhere around 44 years of age.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court views the evidence and the inferences to be drawn therefrom in the light most favorable to the non-moving party. Manders v. State of Oklahoma ex. rel. Department of Mental Health, 875 F.2d 263, 264 (10th Cir. 1989), citing Barber v. General Electric Co., 648 F.2d 1272,1276

n. 1 (10th Cir. 1981). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Material facts" are "facts that might affect the outcome of the suit under the governing law." Id. Factual disputes that are irrelevant or unnecessary will not be counted. Id. In addition, a movant is not always required to come forward with affidavits or other evidence to obtain summary judgment; once the movant points out an absence of proof on an essential element of the non-movant's case, the burden shifts to the non-movant to provide evidence to the contrary. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986).

DISCUSSION

The Plaintiffs correctly state that age discrimination can be established by

direct or indirect evidence. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Brannon v. Price River Coal Co., 853 F.2d 768 (10th Cir. 1988). Plaintiffs claim to have both types of evidence in this case. In regard to direct evidence, the Plaintiffs, primarily rely on a letter allegedly written by Misfer A. Al Ahamdi (sic), Lt Col RSAF to the Peace Hawk Project Officer.[2]

The Plaintiffs further rely on statements allegedly made by RSAF officers to a Lear Siegler employee and to the Plaintiffs. This Court in its order on Defendant's motion in limine, has already ruled that the letter and statements made by RSAF officials, unless testified to by such RSAF officers, are inadmissible as

---

[2] The Peace Hawk Project Officer is a RSAF officer.

hearsay. Thus, disregarding this evidence pursuant to the ruling on the motion in limine, Plaintiffs have offered no direct evidence of discrimination.

The Plaintiffs may also prove their case of age discrimination by indirect evidence, using the framework applicable to discrimination cases under Title VII and set out in McDonnell Douglas Corp. v. Green, supra, and its progeny. See Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1547 n. 1 (10th Cir. 1988). Under the McDonnell Douglas test, a plaintiff bears the burden of establishing a prima facie case of discrimination, but the Supreme Court has made clear that this burden is not onerous. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the plaintiff establishes a prima facie case, this creates a presumption of unlawful discrimination that requires the defendant

to come forward with evidence of a nondiscriminatory reason for its actions. Id. at 254-55. The plaintiff then has the opportunity to show that the defendant's proffered reason was pretextual. Id. at 255-56. In this Circuit, a plaintiff makes out a prima facie case of age discrimination by showing (1) that he was within the protected age group; (2) that he was doing satisfactory work; (3) that he was discharged; and (4) that his position was filled by a younger person. MacDonald v. Eastern Wyoming Mental Health Center, 941 F.2d 1115 (10th Cir. 1991); Merrick v. Northern Natural Gas Company, 911 F.2d 426 (10th Cir. 1990).

The parties here disagree whether the Plaintiffs have met the fourth element of the prima facie case stated above. First, as noted, the Defendant contends that the Plaintiff Waddell who was 56 at the time of his termination, was replaced by

someone who was 61 years of age, while the Plaintiff Waddell claims that his replacement was 51 years old. Defendant also claims that the Plaintiffs must show that they were replaced by someone outside the protected age group or someone younger than 40 years old to meet the fourth element of the prima facie case, while the Plaintiffs claim that they need only show that they were replaced by a younger individual.

In the two Tenth Circuit cases cited above, the Court indicates that the fourth element of a plaintiffs' prima facie case is satisfied if the plaintiff is replaced by a younger person, regardless of whether that younger person is also within the protected age group. Thus, for purposes of discussion only, it is assumed that the Plaintiffs have established their prima facie case under the four-part test listed

above.[3] In response to the prima facie case, the Defendant has offered a legitimate nondiscriminatory reason for the challenged action; i.e., that the RSAF refused to allow the Plaintiffs to work and demanded that they be terminated. The Plaintiffs now bear the burden of persuasion to show that the Defendant's proffered justification was pretextual and that the age of the employees was a determining factor in the Defendant's decision. Merrick v. Northern Natural Gas Company, 911 F.2d at 429. The Plaintiffs are not required to come forward with direct evidence of discriminatory intent, but rather they are only required to show

---

[3] As already noted, there is conflicting evidence as to the age of Mr. Waddell's replacement. In assuming Plaintiffs have met the prima facie test, the Court is also giving Plaintiff the benefit of the doubt. With regard to the age of the replacement, if Mr. Waddell's replacement was in fact 61, the Plaintiff Waddell could not even establish a prima facie case.

that the Defendant's justification is unworthy of credence. Id. However, Plaintiffs have offered absolutely no evidence to show that the proffered justification was pretextual, nor have they shown that the Defendant's justification was unworthy of credence. The central question is whether the Plaintiffs have presented enough evidence to permit a reasonable factfinder to conclude that age was a determinative factor in Lear Siegler's decision. All of the evidence before the Court supports the Defendant's position that the only reason the Plaintiffs were terminated was due to the demands made by the RSAF. The evidence indicates that the majority of workers hired by the Defendant to work in Saudi Arabia were older individuals due to the requirement that these individuals have some past military experience. As noted, the average age of the Defendant's

employees in Saudi Arabia at the time of Plaintiffs' employment appears to be approximately 44 years old, and many of the Defendant's other employees were in fact older than the Plaintiffs.

When a sovereign nation such as Saudi Arabia through the RSAF demands that the employees over whom they have functional and supervisory control be terminated, there appears little if anything that the Defendant could do to change that decision. Again, the undisputed evidence shows that the Defendant attempted to convince the RSAF that the Plaintiffs were qualified and should be retained, but despite this, the RSAF demanded that they be terminated. Plaintiffs' contracts with the Defendant specifically allow the Defendant to terminate the Plaintiffs' employment when directed to do so by the RSAF. Further, it is undisputed that the Plaintiffs were hired specifically to

perform work under the contract in Saudi Arabia, and if they could no longer perform that contract, there has been no requirement shown that the Defendant must find other work for them in the United States. In short, the Defendant only terminated the Plaintiffs because of directions by the RSAF and not because of their age.

Moreover, even if the Court were to consider the hearsay statements that are the subject of the order on the motion in limine, the result here would not be different. The Plaintiffs argue, but have not proven, that the decisions of the RSAF are the responsibility of the Defendant Lear Siegler. Plaintiffs maintain that the RSAF was the agent of the Defendant Lear Siegler. However, according to the contract with the USAF, if anything, the Defendant could be viewed as the agent of the RSAF. Moreover, the Plaintiffs

contend that the Defendant Lear Siegler is responsible for the RSAF under the Saudi Arabian Labor and Workmen Law. Assuming that this Court is somehow bound by Saudi Arabian law, which the Court highly doubts,[4] it would appear that the Plaintiffs must demonstrate that the RSAF was the agent of Defendant Lear Siegler to make this law applicable.

> Article 8
> If the employer entrusts to a natural or juristic person one of his principal operations or any part thereof, the latter shall give his workmen all the rights and privileges granted by the employer to his own workmen, and both shall be jointly and severally responsible for such rights and privileges.

It is beyond this Court's comprehension

---

[4] The Saudi Arabian Law cited by the Plaintiffs appears to be an administrative remedy which the Plaintiffs have failed to exhaust. An application regarding the discharge should have been submitted to the Director of Labor's office of the area in which Plaintiffs' place of work was located within 15 days of the decision to discharge. Labor and Workmen Law, Art. 75.

how the Defendant Lear Siegler could entrust the RSAF with principal operation of a project which is already a RSAF project. The Defendant Lear Siegler did not hire the RSAF to work on Lear Siegler's project. In fact, quite the opposite occurred, as the USAF hired Lear Siegler to work on or provide support for the RSAF's project. The Plaintiffs have failed to prove any legal obligation of the Defendant Lear Siegler for the actions, deeds or thoughts of the RSAF or the SAG.

The Defendant is also entitled to judgment with regard to Plaintiffs' breach of contract claim. The Defendant, pursuant to the unambiguous language of the contract, was entitled to terminate the Plaintiffs if directed to do so by the SAG, through its agent the RSAF.

Accordingly, the Plaintiffs' motion for summary judgment is DENIED and the

Defendant's motion for summary judgment is GRANTED. Judgment will enter accordingly.

IT IS SO ORDERED this 24th day of February 1993.

/s/ DOYLE W. ARGO
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COUNT

FOR THE WESTERN DISTRICT OF OKLAHOMA

HARRY E. BROWNLEE and ROY M. WADDELL,	)	
Plaintiffs	)	
v.	)	CIV-92-318-AR
LEAR SIEGLER MANAGEMENT SERVICES CORP., a foreign corporation,	)	
Defendant	)	

ORDER ON DEFENDANT'S MOTION IN LIMINE

The Plaintiffs have brought this action for age discrimination pursuant to the Age Discrimination in Employment Act of 1967 ("ADEA") and for an alleged breach of their employment contracts against the Defendant, their former employer. The Plaintiffs were employed by the Defendant to work in the Kingdom of Saudi Arabia in partial fulfillment of the Defendant's contract with the United States government to provide technical assistance and support to the Royal Saudi Air Force ("RSAF"). The Plaintiffs were to work at

the functional and supervisory control of the RSAF, but were to remain under the administrative control of the Defendant.

The Plaintiffs allege that they were terminated from employment by the Defendant based on their age in willful violation of the ADEA. Plaintiffs further contend that their termination was in breach of their written employment contracts with the Defendant. Defendant maintains that the Plaintiffs were terminated at the insistence of the RSAF, despite Defendant's efforts. Defendant asserts that they were bound by but not responsible for the decision of the RSAF, under whose direction the Plaintiffs worked. The Defendant argues that it terminated the Plaintiffs due to the RSAF's request and not based on age. Further, the Defendant maintains that it did not breach the employment contract through this termination as the employment

contracts signed by each Plaintiff specifically allowed termination of the contract if termination was directed by RSAF.

Through this motion, the Defendant asks that three categories of evidence be excluded on the basis of hearsay:

(1) a letter from an RSAF Lieutenant Colonel, Misfer A. Al Ghamdi to another RSAF officer which in part stated that the Plaintiffs were "too old" to perform their jobs;

(2) statements by a RSAF sergeant in the presence of the Plaintiffs that the Plaintiffs were "too old;" and

(3) a statement by Major Halawani of the RSAF to an employee[1] of Defendant that the Plaintiffs were discharged because they were unable to do their duties and they were too old.

---

[1] This employee, Philip Anastasia, is no longer employed by the Defendant.

The Plaintiff has filed an objection to Defendant's motion in limine.

The Defendant argues that this letter and the other oral statements by RSAF personnel are not admissible as they constitute hearsay evidence. The letter in question was allegedly written by Lt Col Misfer A. Al Ghamdi, RSAF, to the Peach Hawk Project Officer. The letter is copied to Room 205, Bldg. 644, Depot Supply, although an individual name is not listed with that address. This letter is without question "a statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted." Federal Rules of Evidence 801. It is important to remember that Lear Siegler Management Services Corp. ("Lear") is the Defendant in this matter, not the RSAF. The undisputed facts show that Lear did not write the letter, and there is no

evidence despite the argument of Plaintiffs that the RSAF was the agent of Lear. Therefore, the letter cannot be viewed as an admission of a party-opponent. Accordingly, the letter is hearsay and inadmissible unless it falls within an exception to the hearsay rule.

The Plaintiffs contend that the letter falls under the business records exception, Rule 803(6), as it was produced by the Defendant in each of the Plaintiff's personnel files. Documents which fall under the business records exception are allowed into evidence because of their inherent trustworthiness. Such documents are those that are created and/or received in the ordinary course of business.

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly

> conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data complication, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Fed. R. of Evidence, 803(6).

Robert Winklepleck testified that he is the custodian of the personnel files and he has also testified that he is the one who obtained a copy of the letter in question. Further, his testimony clearly indicates that this letter was not created or received in the ordinary course of business, but rather it was obtained as a "back door copy." He has also stated that he did not believe that old age was the real reason for termination based on other circumstances. In order to be admissible under the business record exception to the hearsay rule, the document must have been prepared in the ordinary course of

business, must be made at or near the time of the events it records, and must be based on personal knowledge of entrant or on personal knowledge of informant having business duty to transmit information to entrant. Datamatic Services, Inc. v. U.S., 909 F.2d 1029 (7th Cir. 1990). This letter was not prepared in the ordinary course of Defendant's business and therefore does not fall under the business records exception to the hearsay rule.

Further, even if this letter was not inadmissible hearsay, the letter would still have to be authenticated pursuant to Rule 901 of the Federal Rules of Evidence.

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Federal Rules of Evidence, 901.

Although the Plaintiffs have filed an objection to Defendant's motion in limine,

the Plaintiffs' brief only addresses the letter and not the other two categories of evidence which the Defendant seeks to exclude. Even if Plaintiffs were to object to their exclusion, the statements by RSAF personnel to others is likewise inadmissible hearsay. Just as the document drafted by the RSAF officer to another RSAF officer cannot be attributed to the Defendant, neither can the oral statements of RSAF personnel. The statements, as already discussed, are not admissions of a party opponent. Moreover, the Plaintiffs have not even attempted to suggest an exemption for these categories nor is the Court aware of one. Therefore, the statements of RSAF personnel will be excluded as hearsay.

Accordingly, the Defendant's motion in limine is GRANTED.

IT IS SO ORDERED THIS 17th day of February 1993.

/s/ DOYLE W. ARGO
UNITED STATES MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
JUN 3 1994
OFFICE OF THE CLERK

No. 93-1788

In The

Supreme Court of the United States

October Term, 1993

HARRY E. BROWNLEE and ROY M. WADDELL,

Petitioners,

vs.

LEAR SIEGLER MANAGEMENT SERVICES CORP., a foreign corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE W. DAHNKE (OBA #2131)
Counsel of Record
Of the Firm:
HASTIE AND KIRSCHNER
A Professional Corporation
3000 Oklahoma Tower
210 Park Avenue
Oklahoma City, Oklahoma 73102
(405) 239-6404

Attorneys for Lear Siegler Management Services Corp.

June 3, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

For the reasons contained in the Argument below, Respondent, Lear Siegler Management Service Corp. ("Respondent"), disagrees with Petitioners' formulation of the questions presented for review.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I.

THE QUESTIONS PRESENTED FOR REVIEW BY THE PETITION ARE ARGUMENTATIVE, UNSUPPORTED BY THE RECORD AND WERE NOT DECIDED BY THE COURT OF APPEALS 6

II.

BECAUSE OF THE "UNUSUAL SETTING" OF THIS CASE, NO IMPORTANT QUESTIONS OF FEDERAL LAW ARE PRESENTED BY THE PETITION FOR CERTIORARI 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASE:

York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360 (6th Cir. 1982) 10

STATUTES:

29 U.S.C. §§ 621 *et seq* 1, 10

28 U.S.C. § 636(C)(1) 1

RULES:

Rules of the Supreme Court, Rule 14.1(a) 6

Rules of the Supreme Court, Rule 10 11

STATEMENT OF THE CASE

Following denial of their claims before the Equal Employment Opportunity Commission, Petitioners Harry Brownlee and Roy M. Waddell brought suit in District Court, alleging employment discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, and breach of contract. Petitioners consented to assignment of their case to a Magistrate Judge pursuant to 28 U.S.C. § 636(C)(1).

The undisputed facts upon which the Magistrate Judge based his decision in sustaining Respondent's Motion for Summary Judgment are contained in Appendix "D" to the Petition for Certiorari, pages D3 - D8. The Magistrate Judge's findings were accepted by the Court of Appeals (Petition, App. "A"). Unless otherwise noted, the following references are to the opinions of the lower courts.

Both Petitioners were hired by Respondent in February, 1990 under three (3) year term contracts to perform services in Saudi Arabia under the control and direction of the Royal Saudi Air Force ("RSAF"). Prior to hiring Petitioners, Respondent had entered into a contract with the United States Air Force to provide logistics support to the RSAF in Saudi Arabia (Petition, D-3).

The employment contracts signed by Petitioners contained a termination provision which, *inter alia*, gave Respondent the right to terminate Petitioners if Respondent was directed to do so by the Saudi Arabian Government. Allegations in Petitioners' Statement of the Case (Petition, pp. 8-9) about the adhesive nature of the

employment contracts and representations by Respondent concerning the contracts are not supported by the record and were of no consequence to the lower courts or to the issues presented here.

Because of the nature of the work, most of the persons hired by Respondent were retired military personnel and the average age of Respondent's employees in Saudi Arabia was 44 years. One of Petitioners, Brownlee, was 52 years old at the time of termination, the other, Waddell, was 56.

Shortly after Petitioners' commenced work on an RSAF base, RSAF personnel advised the United States Air Force contract representative and Respondent that Petitioners were unsuitable for their employment and demanded their removal from the country.

Notwithstanding efforts by the United States Air Force representative and Respondent, RSAF refused to reconsider the decision to terminate Petitioners or even to discuss it further. Thereupon, Petitioners were terminated and returned to the United States. The claim in the Petition (Petition, p. 9) that Petitioners were " . . . confronted with the claim of the RSAF management that they were 'too old' " is misleading and not supported by the record. Alleged oral statements to this effect were held by the Magistrate Judge to be inadmissible hearsay, and Petitioners did not contest that ruling in the Court of Appeals.

Likewise, mistaken is Petitioners' assertion that both were replaced by younger men. While Brownlee (aged 52) was undisputedly replaced by a 41 year old, Respondent's personnel records reflect that Waddell (aged 56)

was replaced by a 61 year old. Based solely on a letter written to the EEOC, Waddell contended his replacement was *only* 51 (Petition, D-7).

One matter which has been agreed upon from the beginning of this action was that Petitioners were suitable for the work, and that, as far as Respondent could determine, were performing their work in a satisfactory manner (Petition, D-5).

Contrary to assertions in Petitioners' Statement of the Case (Petition, p. 11), there is no evidence that the representative of the United States ordered or directed Saudi Arabia to admit Petitioners to the RSAF facility to which they were assigned. Nor is there any evidence that the USAF possessed the right to issue such an order to the RSAF.

Upon their return, Petitioners timely filed an age discrimination complaint with the Equal Employment Opportunity Commission, which denied the claims. Then followed the action in the District Court in which Petitioners sought relief under ADEA and damages for breach of contract.

Respondent moved for summary judgment, alleging that the undisputed facts established that Respondent had not been responsible for Petitioners' discharge and, in fact, had opposed the RSAF directive to terminate Petitioners. In addition, Respondent contended that the undisputed facts negated the contract claim.

Respondent also filed a motion in limine to exclude all three items upon which Petitioners based their contention that their discharge had been prompted by age considerations. These items consisted of alleged verbal statements by an RSAF sergeant and an RSAF major to Petitioners and a letter allegedly written by an RSAF lieutenant colonel to another RSAF lieutenant colonel. In responding to the motion in limine, Petitioners made no effort to justify admissibility of the oral statements and contested only the argument that the letter was inadmissible (Petition, E-8).

In sustaining Respondent's motion for summary judgment the Magistrate Judge held that, because it was undisputed that Petitioners lost their jobs as a result of the RSAF's direction (over Respondent's objection), Respondent could not be held liable under ADEA, because the bias of RSAF, if any, was not imputable to Respondent (Petition, D-17).

In addition, the Magistrate Judge found that the termination provisions in Article VI of the employment agreements were unambiguous, entitling Respondent to discharge Petitioners when directed to do so by the Saudi Government (Petition, D-19). The Petitioners' assertion in their Statement of the Case (Petition, p. 15) that they were "improperly terminated without valid reason" is not only unsupported by the record but contrary to the finding of the Courts below.

In a related decision sustaining Respondent's Motion in Limine (Petition, App. "E"), the Magistrate Judge held that the letter written by one RSAF officer to another RSAF officer was not admissible in evidence, because the

letter had not been authenticated and constituted inadmissible hearsay (Petition, E-5 - E-8). Although noting that Petitioners had not opposed that part of the motion directed to the alleged oral statements, the Magistrate Judge ruled that the alleged oral statements were hearsay and inadmissible in any event (Petition, E-8).

After entry of the Magistrate Judge's Order sustaining Respondent's Motion in Limine and Motion for Summary Judgment, Petitioners appealed to the Court of Appeals for the Tenth Circuit. There, Petitioners waived oral argument and did not file a reply brief.

On appeal, Petitioners urged that material questions of fact precluded Summary Judgment and that the Magistrate Judge erred in holding the letter inadmissible. Petitioners did not contest the ruling that the oral statements were inadmissible.

The Court of Appeals reviewed de novo the order sustaining Respondent's Motion for Summary Judgment (Petition, A-4) and affirmed the Magistrate Judge's decision. Accepting the Magistrate Judge's findings of undisputed fact, the Court of Appeals agreed that the allegedly improper motive of the Saudi Government could not be imputed to Respondent (*Id.*, A-8) and that Respondent had justifiably acted under the termination clause of the employment agreements in terminating Petitioners (*Id.*, A-9). The Court specifically rejected the assertion that the termination clause was invalid, finding no conflict between that clause and Respondent's contract with RSAF. (*Id.*, A-11).

In rejecting Petitioners' assertion that the RSAF's alleged discriminatory animus should be imputed to

Respondent, the Court of Appeals found that Petitioners could not "cite a single authority or even present a developed argument" in support of their position and that their contention was only an "unsupported conclusory assertion" and was "not adequate appellate argument." (*Id.*, A-6).

Finding it unnecessary to consider the evidentiary question of admissibility of the letter written by one RSAF officer to another, the Court of Appeals did not review the order sustaining Respondent's Motion in Limine (Petition, A-9).

Petitioners did not seek rehearing in the Court of Appeals before filing the Petition for Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW BY THE PETITION ARE ARGUMENTATIVE, UNSUPPORTED BY THE RECORD AND WERE NOT EVEN DECIDED BY THE COURT OF APPEALS.

Notwithstanding the directive of Rule 14.1(a), Rules of the Supreme Court, the Petition presents four highly argumentative questions for review, all of which assume facts not in the record.

Petitioners' first two "questions" incorrectly assume that Respondent "delegated" its control over Petitioners to the government of Saudi Arabia. In fact, as the Magistrate Judge specifically found (Petition, D-3), Respondent's contract with the USAF obligated Respondent to

provide personnel " . . . to work under the functional and supervisory control of the RSAF. . . . " These "questions" also assume that there was evidence of age related bias by RSAF and that Respondent had knowledge of such bias; in fact, there was, as a result of the ruling on the Motion in Limine, no admissible evidence that Petitioners were terminated because of their age (Petition, D-17 and App. "E").

The third "question" argumentatively and without factual justification, assumes that the employment contracts between Petitioners and Respondent were drawn to "circumvent" provisions of the contract between the United States and Respondent. Nothing in the Record or the decisions of the lower courts supports this assumption. Moreover, the Court of Appeals held that the alleged conflict between Respondent's contract with the USAF and the employment contracts was illusory (Petition, A-11).

The fourth of Petitioners' "questions" is likewise not supported by the Record, because the deposition was never used at trial and the document in question was never offered into evidence by Respondent. Moreover, the "question", which was apparently designed to raise an argument that admissibility was waived, was not even raised in the District Court and was not reached by the Court of Appeals.

Moreover, none of the four "questions presented for review" by Petitioners was either presented or considered by the Courts below. Instead, the only issues decided by the Court of Appeals were:

(a) Is the alleged age based bias of the Royal Saudi Air Force ("RSAF") in refusing to allow continued employment of Petitioners on a RSAF base imputable to Respondent so as to subject Respondent to liability under the Age Discrimination Employment Act, where Respondent hired such employees to work under RSAF control?

(b) Does the employment contract between Petitioners and Respondent permit Respondent to terminate Petitioners when directed to do so by the Saudi Arabian Government?

In addition, the District Court (per the Magistrate Judge) decided an additional issue which the Court of Appeals found it unnecessary to reach: Was the only substantive indicia of age related bias on the part of the RSAF, viz. a letter from one RSAF officer to another, inadmissible because it was unauthenticated and hearsay?

II.

BECAUSE OF THE "UNUSUAL SETTING" OF THIS CASE, NO IMPORTANT QUESTIONS OF FEDERAL LAW ARE PRESENTED BY THE PETITION FOR CERTIORARI.

Petitioners assert that the Writ of Certiorari should be granted because the Court of Appeals incorrectly decided issues of agency and federal law not previously addressed by the Supreme Court and which should be decided by the Supreme Court. Petitioners also contend that the Court of Appeals incorrectly interpreted and failed to apply the provisions of the contract between the

United States Air Force and Respondent. Petitioners conspicuously fail to explain why the Court should decide any of these so called issues.

As noted in the Court of Appeals' decision (Petition, A-6), this case arises from an "unusual setting". The factual setting is unusual in that it involves American nationals, hired by American contractors to work under the direction and control of a foreign government. The legal situation is unique as well, as evidenced by the fact that the Tenth Circuit's opinion is the first known decision under ADEA involving similar facts.

The case arises from a highly unusual tripartite arrangement among the United States Government, the Government of Saudi Arabia, and Respondent, Lear Siegler.

Petitioners signed three (3) year employment contracts with Lear to work in Saudi Arabia under the direction of the RSAF, in connection with Lear's contractual commitment with the United States Air Force to provide technical assistance in support of the RSAF. The United States in turn had an agreement with the Government of Saudi Arabia to provide logistical support to the RSAF.

Most of the employees hired by Respondent to work in Saudi Arabia were retired military, with the average age being somewhere near 44 years of age (Petition, D-8). The Petitioners were removed from their positions by the RSAF, over the objection of Lear and the United States Government representative. Under the uncontroverted evidence, as found by the Magistrate Judge and adopted by the Court of Appeals, Respondent "only terminated

the Petitioners because of directions by the RSAF and not because of their age." (Petition, A-4).

Only a limited number of persons are likely to work abroad under similar contracts. The fact that the persons hired are typically retired military personnel working under term contracts makes the possibility of other ADEA claims of this type remote. The obvious reason is that persons hired to work overseas under term contracts of two or three years are unlikely to be fired for age related reasons, especially if those persons were already in an age protected (over 40) status when hired.

While Petitioners cite a number of decisions (only one of which was cited to the Court of Appeals), none is contended to be directly in point. Instead, all the cases cited stand for the unremarkable proposition that acts of corporate agents (usually employees) are generally imputable to their employers for purpose of assessing liability under ADEA, 29 USCA §§ 621 *et seq.*, and similar acts. If anything, one of the cited decisions, *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360 (6th Cir. 1982), while not precisely in point, supports the decisions of the Courts below. In *York*, a trade association was held not to be the agent of its active members for purposes of imputing liability under ADEA, a result similar to that reached below. In any event, no conflict is shown to exist between or among any of the cited decisions and the decisions below.

For reasons which are self-evident, the other aspect of the Court of Appeals' decision, i.e., the finding that the employment contract was unambiguous and had not

been breached, has no national significance and requires no review.

Finally, Petitioners' argument that the RSAF letter was admissible (Petition, pp. 31-2), is not even stated as an issue in the "Questions Presented . . . " section of the Petition. This uncertainty over the issue Petitioners ask the Court to consider is itself reason enough to deny the Petition, especially when coupled with the absence of any cited authority, any demonstration of the issue's importance and the fact that the Court of Appeals bypassed the issue altogether.

In summary, this case presented a thoroughly unique factual situation, one which is unlikely to be repeated or to have any guiding precedential value for the law of age discrimination, contracts or evidence. Accordingly, Petitioners have failed to satisfy any of the criteria of Rule 10, Rules of the Supreme Court.

CONCLUSION

This case does not merit the Court's time or attention to the merits. Accordingly, the Petition should be denied.

Respectfully submitted,

LEAR SIEGLER MANAGEMENT SERVICES CORP.

GEORGE W. DAHNKE (OBA #2131)
Counsel of Record

Of the Firm:
HASTIE AND KIRSCHNER
A Professional Corporation
3000 Oklahoma Tower
210 Park Avenue
Oklahoma City, Oklahoma 73102
(405) 239-6404

Attorneys for Lear Siegler Management Services Corp.